



## **FEDERAL TRADE COMMISSION**

### **16 CFR Part 425**

### **RIN 3084-AB60**

### **Negative Option Rule**

**AGENCY:** Federal Trade Commission.

**ACTION:** Initial notice of informal hearing; final notice of informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) has proposed amendments to the “Rule Concerning the Use of Prenotification Negative Option Plans,” to be retitled the “Rule Concerning Subscriptions and Other Negative Option Plans” (“Negative Option Rule” or “Rule”). The proposed changes are calculated to combat unfair or deceptive business practices, including recurring charges for products or services consumers do not want and cannot cancel without undue difficulty. In response to the notice of proposed rulemaking, several commenters requested an informal hearing. The informal hearing will be conducted virtually on January 16, 2024, at 10 a.m. Eastern, and the Commission’s Chief Presiding Officer, the Chair, has appointed Administrative Law Judge for the Securities and Exchange Commission, the Honorable Carol Fox Foelak, to serve as the presiding officer of the informal hearing.

**DATES:** The informal hearing will be conducted virtually starting at 10 a.m. Eastern on January 16, 2024.

**ADDRESSES:** Hearing participants may submit their oral presentations in writing or file supplementary documentary submissions online or on paper by following the instructions in Part IV of the **SUPPLEMENTARY INFORMATION** section below. Write “Negative Option Rule (16 CFR Part 425) (Project No. P064202)” on your request or documentary submission, and file it online through <https://www.regulations.gov>. If you

prefer to file your request or documentary submission on paper, please send it via overnight service to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex N), Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Katherine Johnson, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580 (*phone*: 202-326-2185).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Following public comment on an advance notice of proposed rulemaking (ANPR), 84 FR 52393 (Oct. 2, 2019), the FTC proposed amending the Negative Option Rule as described in a notice of proposed rulemaking (NPRM), 88 FR 24716 (Apr. 24, 2023). The Commission posted 1,163 public comments in response to the NPRM.<sup>1</sup>

**II. The Requests for an Informal Hearing; Presentation of Oral Submissions**

Section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, and the Commission’s Rules of Practice, 16 CFR 1.11(e), provide interested persons the opportunity to make an oral statement at an informal hearing upon request.<sup>2</sup> To make such a request, a commenter must submit, no later than the close of the comment period for the NPRM, (1) a request to make an oral submission, if desired; (2) a statement identifying the interested person’s interests in the proceeding; and (3) any proposal to add disputed issues of material fact to be addressed at the hearing.<sup>3</sup>

The Commission received six<sup>4</sup> such requests in response to the NPRM from:

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<sup>1</sup> See FTC, Negative Option Rule, <https://www.regulations.gov/document/FTC-2023-0033-0001/comment>.

<sup>2</sup> The FTC Act provides that “an interested person is entitled to present his position orally or by documentary submission (or both).” 15 U.S.C. 57a(c)(2)(A).

<sup>3</sup> 16 CFR 1.11(e)(1)–(3).

<sup>4</sup> All but one—TechFreedom—identified their interest in the proceeding either as industry groups or as

1. International Franchise Association (IFA)<sup>5</sup>
2. TechFreedom<sup>6</sup>
3. Performance Driven Marketing Institute (PDMI)<sup>7</sup>
4. NCTA – The Internet & Television Association (NCTA)<sup>8</sup>
5. FrontDoor<sup>9</sup>
6. Interactive Advertising Bureau (IAB)<sup>10</sup>

The Commission finds that these requests were adequate and therefore will hold an informal hearing. These commenters constitute the Commission’s list of interested persons, pursuant to Commission Rule 1.12(a)(4), who will make oral presentations or additional submissions (or both) during the hearing.<sup>11</sup> The Commission has not

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private companies with vested interests in the outcome of this rulemaking. *See* TechFreedom comment (June 23, 2023), <https://www.regulations.gov/comment/FTC-2023-0033-0872>.

<sup>5</sup> IFA identified itself as “the world’s oldest and largest organization representing franchising” whose members include “franchise companies, individual franchises, and companies that support franchise companies,” explaining that “IFA is particularly concerned on [sic] the potential adverse effects of the proposed amendments to the Rule on franchised small businesses.” IFA comment at 1 (June 23, 2023), <https://www.regulations.gov/comment/FTC-2023-0033-0856>.

<sup>6</sup> Although TechFreedom failed to identify its interests in the rulemaking proceeding, according to a recent internet search, “TechFreedom is a non-profit, non-partisan technology think tank launched in 2011, . . . [f]ocusing on issues of Internet freedom and technological progress.” *See* TechFreedom, *About*, <https://techfreedom.org/about/> (last visited Nov. 30, 2023).

<sup>7</sup> PDMI explained that its more than 130 member companies, doing business in performance and direct-to-consumer marketing, “market their goods or services using the types and styles of marketing covered by the FTC’s proposed Rule changes.” PDMI comment at 1 (June 23, 2023), <https://www.regulations.gov/comment/FTC-2023-0033-0864>.

<sup>8</sup> NCTA stated that its members provide consumers with “cable, broadband, voice, video streaming, and other services” and “is the principal trade association for the U.S. cable industry,” and expressed concern the “proposed rule will have unintended consequences that would burden, confuse, and harm consumers, and would prohibit Members from providing consumers with key information that could inform their decisions about whether to modify or cancel their services.” NCTA comment at 1-2 (June 23, 2023), <https://www.regulations.gov/comment/FTC-2023-0033-0858>.

<sup>9</sup> FrontDoor stated that it and its subsidiaries “have served millions of customers for over fifty years by offering comprehensive home repair and maintenance services through an extensive network of pre-qualified professional contractors” and that many of the contracts it offers come with an automatic renewal option. FrontDoor comment at 1 (June 23, 2023), <https://www.regulations.gov/comment/FTC-2023-0033-0862>.

<sup>10</sup> IAB represents “over 700 leading media companies, brand marketers, agencies, and technology companies” responsible for “selling, delivering, and optimizing digital advertising and marketing campaigns,” and whose members “account for 86 percent of online advertising expenditures” in the United States. IAB comment at 1 (June 23, 2023), <https://www.regulations.gov/comment/FTC-2023-0033-1000>.

<sup>11</sup> *See infra* Part IV. These interested persons are referred to herein as the “Hearing Participants.”

determined whether there are any groups of interested persons with the same or similar interests in the proceeding, so it does not include any such list in this Notice.<sup>12</sup>

### **III. Disputed Issues of Material Fact; Final Notice**

In the NPRM, the Commission did not identify any disputed issues of material fact that need to be resolved at an informal hearing. The Commission may still do so, however, after the NPRM, either on its own initiative or in response to a persuasive showing from a commenter.<sup>13</sup> Two interested persons, NCTA and IAB, proposed that the Commission consider several potential disputed issues of material fact.<sup>14</sup> Specifically, NCTA proposed the following (reprinted verbatim):<sup>15</sup>

- Is there substantial evidence that 1) broadband, cable, voice (including both VoIP and mobile wireless services), and video streaming service providers have failed to provide consumers with material information relating to their services and any negative option features and 2) such practices are prevalent?
- Is there substantial evidence that 1) broadband, cable, voice (including both VoIP and mobile wireless services), and video streaming service providers have imposed unwanted services on consumers through deceptive statements made during enrollment and 2) such practices are prevalent?
- Is there substantial evidence that 1) broadband, cable, voice (including both VoIP and mobile wireless services), and video streaming service providers have imposed unwanted services on consumers through deceptive communications when consumers seek to cancel one or more of their services and 2) such practices are prevalent?
- Is there substantial evidence that 1) broadband, cable, voice (including both VoIP and mobile wireless services), and video streaming service providers have misrepresented their billing practices relating to automatic renewal and 2) such practices are prevalent?
- Is there substantial evidence that 1) broadband, cable, voice (including both VoIP and mobile wireless services), and video streaming service providers have failed to obtain consent from consumers before enrolling them for automatically renewing services and 2) such practices are prevalent?

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<sup>12</sup> Commission Rule 1.12(a)(5) requires the initial notice of informal hearing to include a “list of the groups of interested persons determined by the Commission to have the same or similar interests in the proceeding.” 16 CFR 1.12(a)(5).

<sup>13</sup> 88 FR 24716, 24730 (Apr. 24, 2023).

<sup>14</sup> FrontDoor requested that the Commission “hold an informal hearing to engage in further factfinding on the disputed issues of material fact that have been raised in comments” but FrontDoor failed to identify any specific disputed issues of material fact as required by Commission Rule 1.11(e)(3). FrontDoor comment at 3.

<sup>15</sup> NCTA comment at 35-37.

- Is there substantial evidence that 1) consumers have difficulty cancelling their broadband, cable, voice, or video streaming services and 2) such difficulty is due to practices and processes of providers that are prevalent?
- Is there substantial evidence that 1) a click-to-cancel approach for multi-faceted, complex, and often bundled broadband, cable, voice, and video streaming services benefits consumers and 2) such benefits outweigh the downsides and consumer harms?
- Is there substantial evidence that 1) consumers often forget they have purchased broadband, cable, voice, or video streaming services, warranting an annual notice to remind them they are not incurring charges for services they do not want to use and 2) such practices are prevalent?
- Is there substantial evidence that broadband, cable, voice, or video streaming service transactions have distinctive characteristics which place consumers in a disadvantaged bargaining position and leave them especially vulnerable to prevalent unfair and deceptive practices?
- Is there substantial evidence that 1) consumers are burdened by listening to “saves” or “upsells” and 2) burdensome “saves” or “upsells” are prevalent?
- Do consumers who hear a “save” often decide to retain or modify service?
- If the proposed Rule is adopted, will 1) the “click to cancel” mechanism as required by proposed section 425.6(c) impose significant costs on businesses that must change systems and user interfaces and 2) these costs on businesses result in higher costs for consumers?
- If the proposed Rule is adopted, will 1) a prohibition on “saves” as required by proposed section 425.6(d) impose significant costs on businesses and 2) these costs on businesses result in higher costs or less access to discounts for consumers?

IAB,<sup>16</sup> for its part, indicated that it “intended to raise several disputed issues of material fact,” first with respect to the compliance costs and the accuracy of the

Commission’s estimates as follows (reprinted verbatim):

- Whether the costs associated with implementing these new requirements will be significantly higher than the FTC estimates; and
- Whether the NPRM makes compliance easier for businesses, in light of the lack of preemption of state law.

And, as “to each of the major substantive sections in the NPRM”:

- Whether the disclosure requirements proposed by the NPRM improve customer understanding of the terms of an automatic renewal across devices and contexts;

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<sup>16</sup> IAB comment at 20-21.

- Whether the double opt-in consent requirement improves consumer understanding, even if sellers disclose the autorenewal feature per the proposed disclosure requirements;
- Whether a cancellation flow that complies with the Commission’s requirements (i.e., that asks the consumer for consent to receive a save) is easier for a consumer to navigate and understand than a cancellation flow that simply provides the offer or discount;
- Whether consumers are actually confused or burdened by a reasonable number of “saves”; and
- Whether the deceptive practices identified in the rulemaking record are limited to certain media (e.g., phone or in-person).

To be appropriate for cross-examination or rebuttal, a disputed issue of material fact must raise “specific facts” and not “legislative facts”<sup>17</sup> and must be not only “material” but also “necessary to be resolved.”<sup>18</sup> The relevant legislative history explains “disputed issues of material fact necessary to be resolved” should be interpreted narrowly.<sup>19</sup> As explained below, the Commission has reviewed the two interested

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<sup>17</sup> Commission Rule 1.12(b)(1) (“An issue for cross-examination or the presentation of rebuttal submissions, is an issue of specific fact in contrast to legislative fact.”). This Commission Rule follows directly from the legislative history of the adoption of Section 18 of the FTC Act: “The only disputed issues of material fact to be determined for resolution by the Commission are those issues characterized as issues of specific fact in contrast to legislative fact. It was the judgment of the conferees that more effective, workable and meaningful rules will be promulgated if persons affected by such rules have the opportunity afforded by the bill, by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are erroneous.” H.R. Rep. No. 93-1606, at 34 (Dec. 16, 1974) (Conf. Rep.). As further explained in *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), the distinction between “specific fact” and “legislative fact” grew out of a recommendation from the Administrative Conference of the United States (ACUS):

Conference Recommendation 72-5 is addressed exclusively to agency rulemaking of general applicability. In such a proceeding, almost by definition, adjudicative facts are not at issue, and the agency should ordinarily be free to, and ordinarily would, proceed by the route of written comments, supplemented, perhaps, by a legislative-type hearing. Yet there may arise occasionally in such rulemaking proceedings factual issues which, though not adjudicative, nevertheless justify exploration in a trial-type format because they are sufficiently narrow in focus and sufficiently material to the outcome of the proceeding to make it reasonable and useful for the agency to resort to trial-type procedure to resolve them. These are what the Recommendation refers to as issues of specific fact.

*Id.* at 1164.

<sup>18</sup> 16 CFR 1.13(b) (addressing issues that “must” be considered for cross-examination or rebuttal are only those disputed issues of fact the Commission determines “material” and “necessary to be resolved”). See also 15 U.S.C. 57a(c)(2)(B) (providing that cross-examination and rebuttal are available only “if the Commission determines that there are disputed issues of material fact it is necessary to resolve”).

<sup>19</sup> See, e.g., H.R. Rep. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S.C.A.N. 7702, 7728; *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1163 (D.C. Cir. 1979) (quoting H.R. Rep. No. 93-1606, at 33 (1974) (Conf. Report)).

persons' proposed disputed issues of material fact and has determined that they are not "disputed," "material," or "specific facts" "necessary to be resolved."

In this context, "disputed" and "material" are given the same meaning as in the standard for summary judgment.<sup>20</sup> As in summary judgment, the challenging party must do more than simply assert there is a dispute regarding the Commission's findings. If those findings are otherwise adequately supported by record evidence, they must come forward with sufficient evidence to show there is a genuine, bona fide dispute over material facts that will affect the outcome of the proceeding.<sup>21</sup> As discussed below, NCTA and IAB proposed disputed issues of material fact challenging the Commission's findings as to (1) the prevalence of unfair or deceptive acts or practices in negative option marketing; (2) the sufficiency of the evidence supporting the various Rule provisions and the Commission's statements on the proposed Rule's economic impact. However, these findings are supported by ample evidence in the record, and neither interested person identified any evidence challenging the FTC's conclusions.

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<sup>20</sup> As explained in the legislative history:

The words 'disputed issues of material fact' are intended to describe and limit the scope of cross-examination in a rulemaking proceeding. Thus, the right of participants in the proceeding to cross-examine Commission witnesses does not include cross-examination on issues as to which there is not a bona fide dispute. In this connection, the Committee considers the rules of summary judgment applied by the courts analogous. Where the weight of the evidence is such that there can be no bona fide dispute over the facts, summary judgment is proper. Similarly, in such a situation cross-examination would not be permitted; neither is a participant entitled to cross-examination where the disputed issues do not involve material facts. This language in the bill is used to distinguish facts which might be relevant to the proceeding but not of significant enough import to rise to the level of materiality. The word material is used here with the same meaning it is given under the common law rules of evidence. Also of importance is the word 'fact.' Cross-examination is not required regarding issues in rulemaking proceedings which are not issues of fact. Examples of such issues are matters of law or policy or matters whose determination has been primarily vested by Congress in the Federal Trade Commission. Thus, unless the subject matter with regard as to which cross-examination is sought relates to disputed issues, which are material to the proposed rule and which are fact issues, there is no right to cross-examination on the part of any party to the proceeding.

H.R. REP. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7728.

<sup>21</sup> *Id.* See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (explaining the standard as "[o]nly disputes over facts that might affect the outcome"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

As to prevalence, the Commission must make two findings on prevalence if it promulgates a rule under Section 18. First, it must explain its “reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent” when, after an ANPR, it issues an NPRM.<sup>22</sup> The Commission did that.<sup>23</sup> The second is that, in the statement of basis and purpose to accompany any final rule, the Commission must include “a statement as to the prevalence of the acts or practices treated by the rule.”<sup>24</sup> The Commission’s prevalence findings need only have “some basis or evidence” to show “the practice the FTC rule seeks to regulate does indeed occur.”<sup>25</sup> The Commission based its first prevalence finding on its extensive record of law enforcement cases challenging deceptive or unfair negative option practices. The robust rulemaking record also included comments from State Attorneys General, who also have vast experience in this area, as well as comments from consumer advocates and individual consumers. There is no genuine dispute as to the fact that, if the Commission decides, after the informal hearing, to promulgate a final rule, it will be able to include a statement as to the prevalence of the negative-option practices treated by the rule with far more than some basis or evidence that they do indeed occur.

As to evidentiary sufficiency, the Commission’s factual findings are supported by substantial evidence if the record contains “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>26</sup> Again, based on evidence cited in the NPRM and from FTC cases, State Attorneys General, and commenters, the Commission has more than adequate evidence from which one could find unfair or

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<sup>22</sup> 15 U.S.C. 57a(b)(3).

<sup>23</sup> 88 FR 24716, 24725 & n.60 (collecting cases). *See also* ANPR, 84 FR 52393, 52396 (noting that “recent cases and the high volume of ongoing complaints suggests there is prevalent, unabated consumer harm in the marketplace” and soliciting comment on prevalence).

<sup>24</sup> 15 U.S.C. 57a(d)(1). “The contents and adequacy of any statement required” in the statement of basis and purpose, such as the statement as to prevalence, “shall not be subject to judicial review in any respect.” *Id.* 57a(e)(5)(C).

<sup>25</sup> *Pa. Funeral Dirs. v. FTC*, 41 F.3d 81, 87 (3d Cir. 1994).

<sup>26</sup> *Id.*, 41 F.3d at 85 (citing cases).



deceptive practices in negative option marketing. No interested person identified any evidence showing otherwise. For instance, both NCTA and IAB suggested there is insufficient evidence to support the Commission’s initial finding that costs imposed by implementing the Rule’s disclosure and other requirements are not significant. However, this statement, without more, does not rise to the level of a bona fide dispute, and no reasonable factfinder could conclude the Commission has failed to meet the applicable standard given its vast experience in this area and the extensive rulemaking record.

Further, NCTA’s and IAB’s proposed disputed issues of material fact challenge the Commission’s findings as to quintessentially “legislative facts”—“facts which help the tribunal determine the content of law and of policy.”<sup>27</sup> Because such facts “combine empirical observation with application of administrative expertise to reach generalized conclusions, they need not be developed through evidentiary hearings.”<sup>28</sup> Thus, because these do not raise questions of “specific fact,” they do not warrant cross-examination and rebuttal submissions.<sup>29</sup>

Accordingly, the Commission finds that the issues raised by NCTA and IAB are not genuinely disputed or material within the narrow meaning set forth in the case law and legislative history and that they do not require a “trial-type” proceeding for their proper determination because they are not issues of “specific fact.” Therefore, the Commission finds that there are no “disputed issues of material fact” to resolve at the informal hearing<sup>30</sup> and no need for cross-examination or rebuttal submissions.<sup>31</sup>

This initial notice of informal hearing also serves as the “final notice of informal hearing.”<sup>32</sup> A final notice of informal hearing is limited in its substance to matters that

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<sup>27</sup> *Ass’n of Nat’l Advertisers*, 627 F.2d at 1161-62 (D.C. Cir. 1979) (internal citation omitted).

<sup>28</sup> *Id.* at 1162.

<sup>29</sup> See generally *supra* nn.18-22.

<sup>30</sup> If any interested person seeks to have disputed issues of material fact designated by the presiding officer, the interested person may make such request pursuant to Commission Rule 1.13(b)(1)(ii), 16 CFR 1.13(b)(1)(ii).

<sup>31</sup> 16 CFR 1.12(b).

<sup>32</sup> 16 CFR 1.12(c).

arise only when the Commission designates disputed issues of material fact: who will conduct cross-examination; whether any interested persons with similar interests will be grouped together for such purposes; and who will make rebuttal submissions.<sup>33</sup> Because cross-examination and submission of rebuttal evidence are not anticipated to occur in this informal hearing, no separate final notice of informal hearing is necessary.

#### **IV. List of Hearing Participants; Making an Oral Statement; Requests for Documentary Submissions.**

Pursuant to Commission Rule 1.12(a)(4), 16 CFR 1.12(a)(4), the following is the list of interested persons (“Hearing Participants”) who will have the opportunity to make oral presentations at the informal hearing:

1. International Franchise Association (IFA)
2. TechFreedom
3. Performance Driven Marketing Institute (PDMI)
4. NCTA – The Internet & Television Association (NCTA)
5. FrontDoor
6. Interactive Advertising Bureau (IAB)

Oral statements will be limited to 10 minutes, although they may be supplemented by documentary submissions as described below, and the presiding officer may grant an extension of time for good cause shown. Transcripts of the oral statements will be placed in the rulemaking record. Hearing Participants will be provided with instructions as to how to participate in the virtual hearing.

If you are a Hearing Participant and would like to submit your oral presentation in writing or file a supplementary documentary submission, you can do so by submitting a comment on this rulemaking docket. You must do so on or before [INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION IN *THE FEDERAL REGISTER*]. Write

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<sup>33</sup> *Id.*

“Negative Option Rule (16 CFR Part 425) (Project No. P064202)” on your submission. If you file a documentary submission under this Section, your documentary submission—including your name and your state—will be placed on the public record of this proceeding, including on the website <https://www.regulations.gov>. To ensure the Commission considers your online documentary submission, please follow the instructions on the web-based form.

Because your documentary submission will be placed on the public record, you are solely responsible for making sure that it does not include any sensitive or confidential information. In particular, your documentary submission should not contain sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your documentary submission does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your documentary submission should not include any “[t]rade secret or any commercial or financial information which . . . is privileged or confidential”—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including, in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Documentary submissions containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with Commission Rule 4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the documentary submission must include the factual and legal basis for the request and must identify the specific portions to be withheld from the public record. *See* Commission Rule 4.9(c). Your documentary

submission will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your documentary submission has been posted publicly at <https://www.regulations.gov>—as legally required by Commission Rule 4.9(b), 16 CFR 4.9(b)—we cannot redact or remove it, unless you submit a confidentiality request that meets the requirements for such treatment under Commission Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of documentary submissions to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive documentary submissions it receives on or before [INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION IN *THE FEDERAL REGISTER*]. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/siteinformation/privacypolicy>.

Hearing Participants who need assistance should indicate as much in their comment, and the Commission will endeavor to provide accommodations. Hearing Participants without the computer technology necessary to participate in video conferencing will be able to participate in the informal hearing by telephone; they should indicate as much in their comments.

## **V. Conduct of the Informal Hearing; Role of Presiding Officer**

The Commission’s Chief Presiding Officer, the Chair, has appointed and designates Administrative Law Judge for the Securities and Exchange Commission, the Honorable Carol Fox Foelak, to serve as the presiding officer of the informal hearing. Judge Foelak will conduct the informal hearing virtually using video conferencing starting at 10:00 a.m. Eastern on January 16, 2024. The informal hearing will be available

for the public to watch live from the Commission's website, <https://www.ftc.gov>, and a recording or transcript of the informal hearing will be placed in the rulemaking record.

Because there are no "disputed issues of material fact" to resolve at the informal hearing, the presiding officer is not anticipated to make a recommended decision.<sup>34</sup> The role of the presiding officer therefore will be to preside over and to ensure the orderly conduct of the informal hearing, including selecting the sequence in which oral statements will be heard, and to place the transcript and any additional written submissions received into the rulemaking record. The presiding officer may prescribe additional procedures or issue rulings in accordance with Commission Rule 1.13, 16 CFR 1.13. In execution of the presiding officer's obligations and responsibilities under the Commission Rules, the presiding officer may issue additional public notices.

## **VI. Communications by Outside Parties to the Commissioners or Their Advisors**

Pursuant to Commission Rule 1.18(c)(1), 16 CFR 1.18(c)(1), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment. Written communications and summaries or transcripts of oral communications shall be placed on the rulemaking record if the communication is received before the end of the comment period. They shall be placed on the public record if the communication is received later. Unless the outside party making an oral communication is a member of Congress, such communications are permitted only if advance notice is published in the Weekly Calendar and Notice of "Sunshine" Meetings.<sup>35</sup>

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<sup>34</sup> See 16 CFR 1.13(d) ("The presiding officer's recommended decision will be limited to explaining the presiding officer's proposed resolution of disputed issues of material fact.").

<sup>35</sup> See 15 U.S.C. 57a(i)(2)(A); 16 CFR 1.18(c).

By direction of the Commission.

**Joel Christie,**

*Acting Secretary.*

[FR Doc. 2023-26946 Filed: 12/7/2023 8:45 am; Publication Date: 12/8/2023]